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# Excess Condemnation in California— A Further Expansion of the Right to Take

By ROBERT E. CAPRON\*

THE power of California condemnors to acquire real property by state eminent domain proceedings has been greatly expanded during the last fifty years. Under present state law, agencies may constitutionally acquire private property for any legislatively authorized improvement that is reasonably related to the public welfare.<sup>1</sup> Moreover, condemnors may condemn an estate greater than is arguably needed for the proposed project,<sup>2</sup> acquire property to exchange for property to be used for a public improvement,<sup>3</sup> take land for future needs,<sup>4</sup> and condemn property to eliminate land uses detrimental to the public health, safety, morals, and welfare.<sup>5</sup> The power of eminent

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<sup>1</sup> *Bauer v. Ventura County*, 45 Cal. 2d 276, 284, 289 P.2d 1, 6 (1955); *Larsen v. San Francisco*, 152 Cal. App. 2d 355, 369, 313 P.2d 959, 967 (1957); *University of S. Cal. v. Robbins*, 1 Cal. App. 2d 523, 525-26, 37 P.2d 163, 164 (1934).

<sup>2</sup> *Santa Barbara v. Cloer*, 216 Cal. App. 2d 127, 131, 30 Cal. Rptr. 743, 745 (1963) (holding resolution conclusive on necessity for taking the fee); *Los Angeles County Flood Control Dist. v. Jan*, 154 Cal. App. 2d 389, 393-94, 316 P.2d 25, 28 (1957).

<sup>3</sup> *People ex rel. Department of Pub. Works v. Garden Grove Farms*, 231 Cal. App. 2d 666, 672, 42 Cal. Rptr. 118, 122 (1965); CAL. STREETS & H'WAYS CODE § 104(b); CAL. WATER CODE § 253(b); see *Brown v. United States*, 263 U.S. 78, 82 (1923); Comment, *Substitute Condemnation*, 54 CALIF. L. REV. 1097 (1966).

<sup>4</sup> E.g., *Kern County Union High School Dist. v. McDonald*, 180 Cal. 7, 14, 179 P. 180, 184 (1919); *Vallejo & N.R.R. v. Reed Orchard Co.*, 169 Cal. 545, 568-69, 147 P. 238, 249 (1915); *Central Pac. Ry. v. Feldman*, 152 Cal. 303, 309, 92 P. 849, 852 (1907); *Monterey County Flood Control & Water Conser. Dist. v. Hughes*, 201 Cal. App. 2d 197, 214-15, 20 Cal. Rptr. 252, 263 (1962); *San Diego Gas & Elec. Co. v. Lux Land Co.*, 194 Cal. App. 2d 472, 480, 14 Cal. Rptr. 899, 904 (1961); *Los Angeles County Flood Control Dist. v. Jan*, 154 Cal. App. 2d 389, 393-94, 316 P.2d 25, 28 (1957); *Northern Light & Power Co. v. Stacher*, 13 Cal. App. 404, 407-08, 109 P. 896, 903 (1910); CAL. STREETS & H'WAYS CODE § 104.6; CAL. WATER CODE §§ 258, 11575.1; see 1963 Cal. Stats. ch. 1242, §§ 2-8, at 2764-66 (appropriation); cf. CAL. GOV'T CODE § 15862 (control of property taken, but not yet needed).

<sup>5</sup> CAL. HEALTH & SAFETY CODE § 33047(c); see *Fellom v. Redevelopment Agency*, 157 Cal. App. 2d 243, 246, 320 P.2d 884, 887 (1958); *Babcock v. Com-*

domain may also be used in some cases for "recoupment" purposes, i.e., to acquire land which the condemnor plans to resell later to private individuals to recover part or all of the cost of the improvement. These recoupment acquisitions can also be quite profitable for the condemnor since, assuming a rising market for land, the condemned property often can be resold later for a price substantially above that of cost. The purpose of this article is to explore the various theories underlying excess takings in general, and "recoupment" acquisitions in particular, to determine what validity, if any, they might have under either constitutional mandates or statutory authorizations.

## I. Limitations on the Right to Take Generally

### A. Constitutional and Legislative Limitations

Before turning to an analysis of excess takings, it is first appropriate to consider limitations on the "right to take" generally. The most important point to understand is that the power of eminent domain is an inherent attribute of sovereignty.<sup>6</sup> Neither the state nor the federal constitution is the source of the power to condemn. Rather, these instruments only impose limitations upon the exercise of the right to take.<sup>7</sup> The two basic constitutional limitations are that private property can be condemned only for a "public use," and that "just compensation" must be paid to the owner of the property acquired.<sup>8</sup> Because these two limitations are mutually independent, a condemnor cannot acquire property for a non-public use regardless of the amount of compensation offered.<sup>9</sup>

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munity Redevelopment Agency, 148 Cal. App. 2d 38, 46-47, 306 P.2d 513, 518-19 (1957); Redevelopment Agency v. Hayes, 122 Cal. App. 2d 777, 797, 266 P.2d 105, 118, *cert. denied*, 348 U.S. 897 (1954).

<sup>6</sup> United States v. Carmack, 329 U.S. 230, 236 (1946); Georgia v. Chattanooga, 264 U.S. 472, 480 (1924); Albert Hanson Lumber Co. v. United States, 261 U.S. 581, 587 (1923); Kohl v. United States, 91 U.S. 367, 371-72 (1875); People *ex rel.* Department of Pub. Works v. Chevalier, 52 Cal. 2d 299, 304, 340 P.2d 598, 601 (1959); People v. Olsen, 109 Cal. App. 523, 530, 293 P. 645, 648 (1930).

<sup>7</sup> Madisonville Traction Co. v. Saint Bernard Mining Co., 196 U.S. 239, 251-52 (1905); People *ex rel.* Department of Pub. Works v. Lagiss, 223 Cal. App. 2d 23, 40-41, 35 Cal. Rptr. 554, 565 (1963); People *ex rel.* Department of Pub. Works v. Nahabedian, 171 Cal. App. 2d 302, 308, 340 P.2d 1053, 1056 (1959).

<sup>8</sup> U.S. CONST. amend. XIV, § 1; CAL. CONST. art. 1, § 14; People *ex rel.* Department of Pub. Works v. Lagiss, 223 Cal. App. 2d 23, 40-41, 35 Cal. Rptr. 554, 565 (1963) (illegal to take property for private use).

<sup>9</sup> *E.g.*, Madisonville Traction Co. v. Saint Bernard Mining Co., 196 U.S. 239, 251-52 (1905); People *ex rel.* Department of Pub. Works v. Chevalier, 52 Cal. 2d 299, 304, 340 P.2d 598, 601 (1959) (*dictum*); San Francisco v. Ross, 44 Cal. 2d 52, 59, 279 P.2d 529, 533 (1955); People *ex rel.* Department of Pub. Works v. Nahabedian, 171 Cal. App. 2d 302, 308, 340 P.2d 1053, 1056 (1959).

Within these broad constitutional limitations the legislature has sole control over the exercise of the power to condemn. Thus, no use can be a public use unless declared so by the legislature.<sup>10</sup> Moreover, no governmental agency can condemn property for a particular public use unless the legislature has delegated the power to the agency to acquire property for such a use.<sup>11</sup> The California Legislature has placed further limitations on the right to take by requiring that the proposed public improvement be a necessary one, that the property sought to be acquired be necessary for the improvement, and that the project be located in a manner most compatible with the greatest public benefit and the least private injury.<sup>12</sup> As a condition precedent to suit, the legislature has also required most, if not all, agencies to adopt a resolution both describing the proposed public use for which the property is required, and finding that the elements of necessity are present in the proposed acquisition.<sup>13</sup> Only if each of these limitations have been met can an agency condemn private property under California law.

## B. Judicial Review of Constitutional and Legislative Limitations

### 1. *Public Use*

Because of its constitutional origin, the limitation that a taking be for a "public use" presents a potentially justiciable issue in every eminent domain action.<sup>14</sup> The condemnor's resolution, however, is *prima facie* evidence in California that the property taken *will* be

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<sup>10</sup> *Los Angeles County v. Anthony*, 224 Cal. App. 2d 103, 36 Cal. Rptr. 308, cert. denied, 376 U.S. 963 (1964); *University of S. Cal. v. Robbins*, 1 Cal. App. 2d 523, 525-26, 37 P.2d 163, 164 (1934); *People v. Olsen*, 109 Cal. App. 523, 530, 293 P. 645, 648 (1930). See also 2 P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 7.4, at 679-80 (rev. 3d ed. 1963).

<sup>11</sup> *E.g.*, *San Francisco v. Ross*, 44 Cal. 2d 52, 55, 279 P.2d 529, 531 (1955); *People v. Superior Court*, 10 Cal. 2d 288, 295-96, 73 P.2d 1221, 1225 (1937); *Sierra Madre v. Superior Court*, 191 Cal. App. 2d 587, 590, 12 Cal. Rptr. 836, 838 (1961); *Eden Memorial Park Ass'n v. Superior Court*, 189 Cal. App. 2d 421, 425, 11 Cal. Rptr. 189, 192 (1961); *Menlo Park v. Certino*, 151 Cal. App. 2d 261, 266, 311 P.2d 135, 139 (1957).

<sup>12</sup> CAL. CODE CIV. PROC. § 1241.

<sup>13</sup> *E.g.*, CAL. STREETS & H'WAYS CODE § 102.

<sup>14</sup> *Rindge v. Los Angeles County*, 262 U.S. 700, 705-06 (1923); *People ex rel. Department of Pub. Works v. Chevalier*, 52 Cal. 2d 299, 304, 340 P.2d 598, 601 (1959); *San Mateo County v. Coburn*, 130 Cal. 631, 634, 63 P. 78, 79 (1900); *Lux v. Haggin*, 69 Cal. 255, 304-05, 10 P. 674, 700 (1886); *Consolidated Channel Co. v. Central Pac. R.R.*, 51 Cal. 269 (1876); *San Mateo County v. Bartole*, 184 Cal. App. 2d 422, 431, 7 Cal. Rptr. 569, 574 (1960); *Menlo Park v. Artino*, 151 Cal. App. 2d 261, 266, 311 P.2d 135, 139 (1957); *Housing Authority v. Forbes*, 51 Cal. App. 2d 1, 4, 124 P.2d 194, 196 (1942); *University of S. Cal. v. Robbins*, 1 Cal. App. 2d 523, 525, 37 P.2d 163, 164 (1934); *People v. Olsen*, 109 Cal. App. 523, 531, 293 P. 645, 648 (1930).

used for a public use.<sup>15</sup> A property owner may only raise the public use issue, therefore, if he pleads specific facts showing fraud, bad faith, or abuse of discretion in the sense that the property will not be put to a public use.<sup>16</sup> If such facts are not pleaded, the resolution is conclusive, binding not only the defendant but apparently the condemnor as well.<sup>17</sup>

Once the public use issue has been properly raised, the court may then determine whether the property is, in fact, being acquired for a public use. The courts have indicated that this determination may involve an inquiry either into whether the legislatively declared use is a public one or into whether the condemnor actually intends to put the property to the proposed public use.<sup>18</sup> In some takings a third public use inquiry is whether specific facts exist to comply with a legislative declaration of public use.<sup>19</sup> While the courts exercise judicial restraint in reviewing the issue of public use, the degree to which they do so appears to depend upon which of these three inquiries is involved in a particular acquisition.

Judicial review of legislative declarations of public use is very limited. Courts have frequently indicated that the doctrine of separation of powers requires them to refrain from invalidating legislative declarations of public use unless there is no possibility that the use declared may be for the welfare of the public.<sup>20</sup> In view of this self-imposed restraint, judicial review becomes more restricted as the public use concept is broadened.

A few early California appellate decisions adopted the so-called "narrow" view of public use.<sup>21</sup> Under this view, a use was public

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<sup>15</sup> *E.g.*, *People ex rel. Department of Pub. Works v. Lagiss*, 223 Cal. App. 2d 23, 36, 35 Cal. Rptr. 554, 562 (1963).

<sup>16</sup> *Id.*; *People v. Olsen*, 109 Cal. App. 523, 531, 293 P. 645, 648 (1930).

<sup>17</sup> *People ex rel. Department of Pub. Works v. Nyrin*, 256 A.C.A. 308, 318-19, 63 Cal. Rptr. 905, 912 (1967).

<sup>18</sup> *See People ex rel. Department of Pub. Works v. Superior Court*, 68 A.C.A. 206, 216, 436 P.2d 342, 348, 65 Cal. Rptr. 342, 348 (1968); *People ex rel. Department of Pub. Works v. Chevalier*, 52 Cal. 2d 299, 304, 340 P.2d 598, 601 (1959); *People ex rel. Department of Pub. Works v. Lagiss*, 223 Cal. App. 2d 23, 39, 35 Cal. Rptr. 554, 564 (1963).

<sup>19</sup> *E.g.*, *Babcock v. Community Redevelopment Agency*, 148 Cal. App. 2d 38, 49, 306 P.2d 513, 520 (1957); *Redevelopment Agency v. Hayes*, 122 Cal. App. 2d 777, 801-02, 266 P.2d 105, 121, *cert. denied*, 348 U.S. 897 (1954); CAL. HEALTH & SAFETY CODE § 33033.

<sup>20</sup> *Linggi v. Garovotti*, 45 Cal. 2d 20, 24, 286 P.2d 15, 18 (1955); *University of S. Cal. v. Robbins*, 1 Cal. App. 2d 523, 526, 37 P.2d 163, 164 (1934); *see Housing Authority v. Dockweiler*, 14 Cal. 2d 437, 449-50, 94 P.2d 794, 801 (1939); *Los Angeles County v. Anthony*, 224 Cal. App. 2d 103, 106, 36 Cal. Rptr. 308, 310 (1964). *See also Stratford Irr. Dist. v. Empire Water Co.*, 44 Cal. App. 2d 61, 111 P.2d 957 (1941).

<sup>21</sup> *Neff v. Imperial Irr. Dist.*, 142 Cal. App. 2d 755, 758, 299 P.2d 359,

only if the condemnor was obligated by law to make the proposed use available to the public, and the public had the right to physical use of the property after the project was completed.<sup>22</sup> By its focus on the physical public use of the condemned property, this test provided apparent precision. For example, excess condemnation proceedings would be precluded because the public would not be entitled to use the excess property acquired. However, the "public usage" test contained many ambiguities. It was never clear, for example, how large a proportion of the public was required to have a right to use the property before such use could be deemed a "public" one. The test also was insufficient to support condemnation by utility companies for such improvements as electric transmission lines. Further, it was never resolved whether the test was met if the public had to pay to use the property after the project was constructed. If such a paid-for use were a "public" one, it would be difficult to state why condemnors could not also acquire land to construct hotels or theaters.<sup>23</sup>

Clearly, California courts now follow a broader and more flexible view of public use, upholding any legislatively authorized taking for a "use which concerns the whole community, or promotes the general interest of such community in its relation to any legitimate [governmental objective]."<sup>24</sup> The physical "public usage" test has been rejected.<sup>25</sup> Public use is not necessarily defeated by a showing that only one class of private persons will be able to use the property acquired.<sup>26</sup> Moreover, a public use may be present even if the condemnor does not intend to occupy the subject property. A plan to lease or sell the property to a private individual whose occupation may be for commercial profit-making purposes is valid as long as the principal purpose of the taking serves a public benefit.<sup>27</sup> Further,

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361 (1956); *University of S. Cal. v. Robbins*, 1 Cal. App. 2d 523, 527, 37 P.2d 163, 165 (1934); *Gravelly Ford Canal Co. v. Pope & Talbot Land Co.*, 36 Cal. App. 556, 563, 178 P. 150, 153 (1918).

<sup>22</sup> 2 P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 7.2[1], at 629 (rev. 3d ed. 1963).

<sup>23</sup> See generally Comment, *Eminent Domain—The Meaning of the Term "Public Use"—Its Effect on Excess Condemnation*, 18 MERCER L. REV. 274 (1966); Note, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599, 603-08 (1949).

<sup>24</sup> *Bauer v. Ventura County*, 45 Cal. 2d 276, 284, 289 P.2d 1, 6 (1955); *Orange County Water Dist. v. Bennett*, 156 Cal. App. 2d 745, 748, 320 P.2d 536, 538 (1958).

<sup>25</sup> *Redevelopment Agency v. Hayes*, 122 Cal. App. 2d 777, 804, 266 P.2d 105, 122-23, cert. denied, 348 U.S. 897 (1954).

<sup>26</sup> *Housing Authority v. Dockweiler*, 14 Cal. 2d 437, 451-52, 94 P.2d 794, 801-02 (1939).

<sup>27</sup> *Los Angeles County v. Anthony*, 224 Cal. App. 2d 103, 106, 36 Cal. Rptr. 308, 310 (1964); *Redevelopment Agency v. Hayes*, 122 Cal. App. 2d 777,

the taking itself, as opposed to the subsequent use or occupation of the property, may constitute a public use if such a taking meets a compelling economic need of the community.<sup>28</sup> In view of this broad judicial attitude toward defining public use, it is rare for a court to void legislative enactments purporting to declare what is and what is not a public use.

California courts are more inclined to review properly raised allegations that the condemnor does not intend to devote the condemned property to the announced use. The property owner, however, clearly has the burden of specifically pleading and proving that the property will not be put to the declared or any other valid public use.<sup>29</sup> Moreover, in view of the scope of public projects and the purposes held to be public uses, it is very difficult for the condemnee to sustain this burden.<sup>30</sup> But if the property owner can show that no relationship exists between his property and the announced or any other public use, the courts find no difficulty in denying the acquisition.<sup>31</sup>

Some condemnors are further restricted by legislative limitations which authorize condemnation only if the condemnor first finds that certain facts exist which justify the taking. In redevelopment cases, for example, a public use exists only if an area is in fact a slum or suffers from the characteristics of a blighted area.<sup>32</sup> The redevelopment agency, therefore, must make such findings of fact before the property can be acquired. These findings can be attacked by a property owner's allegations of fraud or abuse of discretion, but judicial review is limited by the rule that if the findings are merely debatable, rather than arbitrary or capricious, they must stand.<sup>33</sup>

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804, 266 P.2d 105, 122-23, *cert. denied*, 348 U.S. 897 (1954); *see* *San Francisco v. Ross*, 44 Cal. 2d 52, 56, 279 P.2d 529, 531 (1955).

<sup>28</sup> *Redevelopment Agency v. Hayes*, 12 Cal. App. 2d 777, 804, 266 P.2d 105, 122-23, *cert. denied*, 348 U.S. 897 (1954); *see* 14 S.C.L.Q. 145 (1961).

<sup>29</sup> *People ex rel. Department of Pub. Works v. Lagiss*, 223 Cal. App. 2d 23, 36, 35 Cal. Rptr. 554, 562 (1963); *see* *People ex rel. Department of Pub. Works v. Nahabedian*, 171 Cal. App. 2d 302, 308, 340 P.2d 1053, 1056 (1959); *cf.* *Los Angeles County v. Anthony*, 224 Cal. App. 2d 103, 106, 36 Cal. Rptr. 308, 310 (1964).

<sup>30</sup> *See, e.g.,* *People ex rel. Department of Pub. Works v. Lagiss*, 223 Cal. App. 2d 23, 37-38, 35 Cal. Rptr. 554, 563 (1963); *People ex rel. Department of Pub. Works v. Nahabedian*, 171 Cal. App. 2d 302, 308, 340 P.2d 1053, 1056-57 (1959).

<sup>31</sup> *People ex rel. Department of Pub. Works v. Nahabedian*, 171 Cal. App. 2d 302, 308, 340 P.2d 1053, 1056 (1959).

<sup>32</sup> *Redevelopment Agency v. Hayes*, 122 Cal. App. 2d 777, 801-02, 266 P.2d 105, 121, *cert. denied*, 348 U.S. 897 (1954); CAL. HEALTH & SAFETY CODE §§ 33,033-39.

<sup>33</sup> *Babcock v. Community Redevelopment Agency*, 148 Cal. App. 2d 38, 51, 306 P.2d 513, 521-22 (1957).

Some brief mention should be made concerning the justiciability of the issue of "public use" under the federal Constitution. While the due process clause of the fourteenth amendment does limit acquisitions of private property to takings for public uses,<sup>34</sup> state court decisions on public use are virtually immune from Supreme Court review. The Supreme Court does, of course, have the power to determine whether the legislative declaration of public use authorizing a proposed condemnation violates the fourteenth amendment's due process clause,<sup>35</sup> but it has long followed all the rules of judicial restraint followed by California state courts.<sup>36</sup> In addition, the Supreme Court accepts as binding a state court's decision on matters of fact and state law.<sup>37</sup> The Supreme Court has also stated that since the public or non-public nature of a proposed use is influenced by local needs with which the state courts are more familiar, the state court decisions will be accepted unless "clearly erroneous".<sup>38</sup> Further, the Court has indicated and demonstrated that federal condemnors, although constrained by the "public use" limitation of the fifth amendment, have virtual immunity from judicial review of the right to take.<sup>39</sup> Because of each of these expressions and examples of restraint, no state court decision finding a use to be public has ever been reversed by the Supreme Court on federal constitutional grounds.<sup>40</sup>

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<sup>34</sup> *Madisonville Traction Co. v. Saint Bernard Mining Co.*, 196 U.S. 239, 251-52 (1905).

<sup>35</sup> *E.g.*, *Madisonville Traction Co. v. Saint Bernard Mining Co.*, 196 U.S. 239, 253 (1905).

<sup>36</sup> *Berman v. Parker*, 348 U.S. 26, 32 (1954); *United States ex rel. TVA v. Welch*, 327 U.S. 546, 551-52 (1946); *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66 (1925); *Madisonville Traction Co. v. Saint Bernard Mining Co.*, 196 U.S. 239, 253 (1905).

<sup>37</sup> *E.g.*, *Georgia Ry. & Power Co. v. Decatur*, 262 U.S. 432, 438 (1922).

<sup>38</sup> *See O'Neill v. Leamer*, 239 U.S. 244, 253 (1915); *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 530 (1906); *Clark v. Nash*, 198 U.S. 361 (1905); Note, *Excess Condemnation*, 6 *CINN. L. REV.* 196, 203-04 (1932).

<sup>39</sup> *See United States v. Twin City Power Co.*, 350 U.S. 222, 224 (1956); *United States ex rel. TVA v. Welch*, 327 U.S. 546, 557 (1946) (concurring opinion).

<sup>40</sup> 2 P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 7.212[1], at 648-49 (rev. 3d ed. 1963). In *Cincinnati v. Vester*, 33 F.2d 242 (6th Cir. 1929), it was held that the city's proposed acquisition was unconstitutional. The decision was affirmed by the Supreme Court; however, its decision was based on the city's failure to comply with state law. *Cincinnati v. Vester*, 281 U.S. 439, 448-49 (1929). It has since been stated that the *Vester* decision in the Supreme Court was based solely on state law. *United States ex rel. TVA v. Welch*, 327 U.S. 546, 552 (1946); *Southern Pac. Land Co. v. United States*, 367 F.2d 161, 163 n.2 (9th Cir. 1966); *United States v. Certain Real Estate*, 217 F.2d 920, 925 (6th Cir. 1954); *see Marquis, Constitutional and Statutory Authority to Condemn*, 43 *IOWA L. REV.* 170, 190 (1958).



## 2. *Necessity*

Necessity in eminent domain actions involves such considerations as the amount of land needed for the proposed public improvement, the location of the improvement, the wisdom and feasibility of the project, the extent of the estate to be acquired and the choice of tracts to be condemned. Furthermore, many of the issues of necessity involve questions of engineering, as well as matters of public finance, geology, transportation, recreational needs, and water uses. Several authors have suggested that because of the nature of these considerations, courts are ill-suited to determine or review issues of necessity.<sup>41</sup> Nevertheless, it is well established in California that such issues are reviewable unless specifically made non-justiciable by statute.<sup>42</sup>

Several condemnors, however, have been given the benefit of statutes which expressly make their resolutions conclusive evidence of all necessity issues.<sup>43</sup> These statutes have been upheld under the state and federal constitutions even where the property owner specifically alleged fraud, bad faith, and abuse of discretion.<sup>44</sup> The basis of these decisions is that since necessity is a legislative and not a constitutional limitation, the legislature may constitutionally remove necessity issues from judicial review. Thus, the courts have declared that where such a conclusive statute is applicable, if the property owner receives just compensation and his property is taken for a public use, the condemnor's motives for taking the property are of no concern to the property owner.<sup>45</sup>

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<sup>41</sup> E.g., Lavine, *Extent of Judicial Inquiry into Power of Eminent Domain*, 28 So. CAL. L. REV. 369, 376-77 (1955); Marquis, *Constitutional and Statutory Authority to Condemn*, 43 IOWA L. REV. 170, 186 (1958).

<sup>42</sup> E.g., *People v. Van Gordon*, 226 Cal. App. 2d 634, 38 Cal. Rptr. 265 (1964); *Carlsbad v. Wight*, 221 Cal. App. 2d 756, 761-62, 34 Cal. Rptr. 820, 824 (1963); *People ex rel. Department of Natural Resources v. O'Connell Bros.*, 204 Cal. App. 2d 34, 21 Cal. Rptr. 890 (1962).

<sup>43</sup> CAL. CODE CIV. PROC. § 1241(2) (sanitary districts, transit districts, school districts, utility districts, etc.); CAL. GOV'T CODE § 15,855 (state public works board); CAL. PUB. UTIL. CODE § 28,954 (San Francisco Bay Area Rapid Transit); CAL. STREETS & H'WAYS CODE § 103 (Department of Public Works); *id.* § 30,404 (Toll Bridge Authority); CAL. WATER CODE § 251 (Department of Water Resources); *id.* § 8595 (Central Valley Project).

<sup>44</sup> *Rindge Co. v. Los Angeles*, 262 U.S. 700, 708-09 (1923); *Joslin Mfg. Co. v. Providence*, 262 U.S. 668, 678 (1923); *People ex rel. Department of Pub. Works v. Chevalier*, 52 Cal. 2d 249, 305, 307, 340 P.2d 598, 601, 603 (1959); *People ex rel. Department of Pub. Works v. Lagiss*, 223 Cal. App. 2d 23, 34, 35 Cal. Rptr. 554, 561 (1961).

<sup>45</sup> See *Rindge Co. v. Los Angeles County*, 262 U.S. 700, 705-08 (1923); *People ex rel. Department of Pub. Works v. Chevalier*, 52 Cal. 2d 299, 307, 340 P.2d 598, 603 (1959); *Reid v. State*, 193 Cal. App. 2d 799, 805, 14 Cal. Rptr. 597, 601 (1961).

The conclusive presumption statutes are supportable to a large extent on a practical ground as well. The agencies benefited by such statutes in California are those which frequently construct improvements of immense scope, requiring property from many separate ownerships. In the absence of such statutes, different judges could resolve the necessity issues differently in various acquisitions for the same improvement. The conclusive presumption statutes avoid this result by providing a procedure for uniformity.<sup>46</sup>

Such conclusive statutes also have an impact on judicial review of public use because the distinction between issues of necessity and those of public use is difficult to draw and in some cases may overlap. For example, if a plaintiff proposes to acquire more land than could possibly be used for the declared public use, it would be accurate both to object that the land was not necessary to the proposed project, and to argue that the excess land would not be devoted to a public use. But since the vast majority of condemnations in California are initiated by condemnors which have the benefit of a conclusive presumption of necessity, only the latter issue of public use is generally justiciable.<sup>47</sup>

In reviewing issues of necessity, the court will uphold the agency's finding of necessity if the agency can show such a reasonable or practical necessity as would combine the greatest public good with the least private injury and public expense.<sup>48</sup> Moreover, while a condemnor is required to show more than that the property sought is merely convenient to the planned project, it is not required to establish an absolute mechanical necessity.<sup>49</sup>

While the courts have held that public use issues relate to whether the plaintiff will actually devote the property to a public use,<sup>50</sup> issues of necessity have been associated with the propriety or expediency of appropriating particular property to a public use. The courts have summarized this distinction by stating that "public use" relates to the *fundamental character* of the use and not merely to the extent

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<sup>46</sup> *People ex rel. Department of Pub. Works v. Chevalier*, 52 Cal. 2d 299, 307, 340 P.2d 598, 603 (1959).

<sup>47</sup> *People v. Olsen*, 109 Cal. App. 523, 531, 293 P. 645, 648 (1930).

<sup>48</sup> *E.g.*, *People v. Van Gordon*, 226 Cal. App. 2d 634, 636, 38 Cal. Rptr. 265, 266 (1964); *People ex rel. Department of Natural Resources v. O'Connell Bros.*, 204 Cal. App. 2d 34, 40-41, 21 Cal. Rptr. 890, 894 (1962); *Monterey County Flood Control & Water Conser. Dist. v. Hughes*, 201 Cal. App. 2d 197, 213, 20 Cal. Rptr. 252, 262 (1962); *Hawthorne v. Peebles*, 166 Cal. App. 2d 758, 333 P.2d 442 (1959).

<sup>49</sup> *Hawthorne v. Peebles*, 166 Cal. App. 2d 758, 333 P.2d 442 (1959).

<sup>50</sup> *People ex rel. Department of Pub. Works v. Chevalier*, 52 Cal. 2d 299, 304, 340 P.2d 598, 601 (1959); *People ex rel. Department of Pub. Works v. Lagiss*, 223 Cal. App. 2d 23, 39, 35 Cal. Rptr. 554, 564 (1963); *People v. Olsen*, 109 Cal. App. 523, 531, 293 P. 645, 648 (1930).

of it.<sup>51</sup> This distinction has the effect of directing the litigants' attention to the nature of the use actually to be made of the property and not, for example, to the engineering or scientific requirements of a project. Thus, if an agency will actually use the property for a public use, the land may be condemned even if the property is not necessary to the use. Conversely, if the plaintiff does not actually plan to use the property for a public use, the land may not be taken even though it could be necessary for the project. In cases similar to the hypothetical posed above, where property could not possibly be necessary for the proposed improvement, the distinction may well be semantic but it is still followed.

## II. Excess Condemnation

Having discussed the constitutional limitations of "public use" and "necessity" as they apply to condemnation actions generally, it is now appropriate to relate these limitations to those acquisitions of property which are not, in themselves, directly necessary for the construction of the public improvement, i.e., "excess" takings. While entirely proper and reasonable under some circumstances, this power of excess condemnation must be cautiously exercised and stringently limited so as to avoid unwarranted abuses of the private property owner's constitutional rights.

### A. In General

Excess condemnation only became possible when the courts replaced the narrow "public usage" test with a more liberal definition of public benefit. Advocates of excess condemnation developed the "remnant," "protective," and "recoupment" theories to identify the benefits that flow from excess condemnations as being "public," thereby establishing the constitutionally required public use element necessary to permit such takings.

The first of these, the so-called remnant theory, is designed to effectuate the acquisition of small, unusable and therefore relatively worthless parcels of land that are often otherwise left in private ownership following the construction or enlargement of public improvements such as streets or highways.<sup>52</sup> There are two principal justifications for this theory. One argument is that since the remnant

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<sup>51</sup> *Alameda County v. Meadowlark Dairy Corp.*, 227 Cal. App. 2d 80, 86, 38 Cal. Rptr. 474, 478 (1964); cf. *Pacific Tel. & Tel. Co. v. Monolith Portland Cement Co.*, 234 Cal. App. 2d 352, 356, 44 Cal. Rptr. 410, 412 (1965).

<sup>52</sup> Comment, *Eminent Domain—The Meaning of the Term "Public Use"—Its Effect on Excess Condemnation*, 18 MERCER L. REV. 274, 279 (1966); Note, *An Expanded Use of Excess Condemnation*, 21 U. PITT. L. REV. 60, 61 (1959); Annot., 6 A.L.R.3d 297, 317 (1966).

has little value, fairness justifies its acquisition by the condemnor, for otherwise severance damages will equal the "before value" of the remnant, and while compensation to the condemnee would thus equal the value of the whole parcel, the condemnor would receive only a portion of such property.<sup>53</sup> The second argument is that the failure to acquire such remnants could create waste. Because the excess parcels are of little value, they are likely to be abandoned and become depressed areas adjacent to the improvement.<sup>54</sup> Such abandoned remnants would then adversely affect the value of other private property in the area, causing a general decline in property tax revenue.<sup>55</sup> If, however, these remnants are acquired, assembled, replatted into usable lots and then resold by the condemnor, economic problems are avoided while the property owner still receives the just compensation to which he is constitutionally entitled.<sup>56</sup>

The other two theories are comparatively easy to comprehend and to rationalize. The protective theory evolved to help arrest the deterioration of the use and appearance of public improvements by preventing land uses inconsistent with the improvement.<sup>57</sup> Under this theory, property adjacent to the project is condemned, subjected to restrictions limiting the parcels to uses consistent with the project, and then resold. Finally, the recoupment theory allows excess property, no part of which would be used for the improvement, to be acquired and later profitably resold, thereby benefiting the public by offsetting part or all of the cost of the improvement.<sup>58</sup>

Absent statutory distance limitations, the power to condemn for protective or recoupment purposes is potentially much broader than is the power to condemn remnants. In every remnant acquisition at least a portion of the original parcel must be acquired for an acknowledged public use. In protective and recoupment takings, however, no part of the original parcel need be taken for the project.

These three theories obviously are not mutually exclusive. Remnant takings may incidentally serve a protective purpose. Also, an

<sup>53</sup> *People ex rel. Department of Pub. Works v. Superior Court*, 68 A.C. 206, 213, 436 P.2d 342, 346-47, 65 Cal. Rptr. 342, 346 (1968); *Kern County Union High School Dist. v. McDonald*, 180 Cal. 7, 16, 179 P. 180, 184-85 (1919).

<sup>54</sup> 18 W. VA. L. REV. 580, 585 (1932).

<sup>55</sup> See Annot., 6 A.L.R.3d 297, 317-19 (1966).

<sup>56</sup> See 18 CALIF. L. REV. 284, 286 (1930). See also R. CUSHMAN, *EXCESS CONDEMNATION* (1917).

<sup>57</sup> 2 P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 7.5122[2], at 719 (rev. 3d ed. 1963); Bender, *Excess Condemnation in Wisconsin*, 13 MARQ. L. REV. 69, 70 (1929); 18 CALIF. L. REV. 284, 286 (1930).

<sup>58</sup> 2 P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 7.5122[3], at 719-20 (rev. 3d ed. 1963); Bender, *Excess Condemnation in Wisconsin*, 13 MARQ. L. REV. 69 (1929); 18 CALIF. L. REV. 284, 286 (1930); Annot., 6 A.L.R.3d 297, 311-14 (1966).

element of recoupment is inherent in all types of excess takings, exemplified in at least three ways. First, the compensation paid for the excess property is determined without regard to any enhancement in the value of such land that may be caused by the construction of the proposed improvements.<sup>59</sup> However, if the condemning agency resells the condemned property, it is free to sell at a price which reflects project-caused enhancement. Secondly, by acquiring and combining several excess parcels, each of limited or no value, the condemnor may be able to offer a single, fully usable parcel that would bring a price greater than the condemnor paid for each of the individual parcels. Thirdly, the longer the condemnor holds the excess parcels the better the chance that the condemnor will realize a profit from increasing land values. Whichever of these three situations occurs, however, the profits derived from the acquisition and sale of these excess lands can later be used to "recoup" costs paid out for the improvement itself, regardless of the theory under which the excess lands were initially taken.

Nevertheless, the three theories are distinguishable, for each has been formulated to serve a different purpose. Remnant acquisitions are effected to avoid land waste and the payment of severance damages equal to the "before value" of the remnant. Protective acquisitions are made to ensure the usability and esthetic quality of the improvement. Recoupment acquisitions are used solely to finance the improvement.

## B. Excess Takings in California

The extent to which California law authorizes excess condemnations is not entirely settled. While it is clear that this state has embraced the remnant and protective theories for acquisition of excess parcels, the recoupment theory, despite some expansive statutory language indicating its approval, has failed to win such full acceptance. The remainder of this article, therefore, deals with an analysis of California's approach to excess takings as supported by the various theories.

### 1. *Remnant Acquisitions*

The California Legislature has adopted the remnant theory for

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<sup>59</sup> *E.g.*, *Community Redevelopment Agency v. Henderson*, 251 Cal. App. 2d 336, 343, 59 Cal. Rptr. 311, 315 (1967); *Pasadena v. Union Trust Co.*, 138 Cal. App. 2d 1, 26, 31 P.2d 463, 466 (1934); *San Diego v. Boggeln*, 164 Cal. App. 2d 1, 5, 330 P.2d 74, 76 (1958); *Los Angeles County v. Hoe*, 138 Cal. App. 2d 74, 78, 291 P.2d 98, 100 (1955); *Atchison, T. & S.F. Ry. v. Southern Pac. Co.*, 13 Cal. App. 2d 505, 518, 57 P.2d 575, 581 (1936); *Stockton v. Vote*, 76 Cal. App. 369, 400, 244 P. 609, 621 (1926). *See also* Comment, *Recovery for Enhancement and Blight in California*, 20 HASTINGS L.J. 622 (1969).

excess takings in its broadest form. California statutes authorize the Department of Highways,<sup>60</sup> the Department of Water Resources,<sup>61</sup> the Reclamation Board,<sup>62</sup> Water Storage Districts,<sup>63</sup> counties, and cities<sup>64</sup> to acquire an *entire* parcel of property whenever the acquisition of a portion of the parcel for a public use leaves the remainder "in such shape or condition as to be of little value to its owner, or to give rise to claims or litigation concerning severance or other damages . . . ."<sup>65</sup> The legislature has given a similar but more limited power to counties and cities in condemnations for streets or highways. Under this power the remnant can be taken, but only if the fair market value of the portion taken and the severance damages otherwise payable for damages to the remnant equal the fair market value of the whole parcel in its "before" condition.<sup>66</sup>

The essence of the remnant theory was first approved in *Kern County High School District v. McDonald*.<sup>67</sup> In that case, the condemnor sought to acquire the defendant's property to a depth of eighty feet, leaving a relatively worthless twenty foot strip as a remainder. The trial court allowed the district to amend its complaint to acquire the whole parcel, even though no statute then authorized the district to acquire remnants. The supreme court affirmed on equitable grounds, holding that it would be unjust for the condemnor to have to pay for the whole parcel but receive only a portion of it.

The *McDonald* rationale has been used to justify the taking of parcels of little size and value under California's remnant statutes.<sup>68</sup> However, these statutes expand the power of remnant acquisitions far beyond the takings involved in cases like *McDonald*. The extent to which these statutes validly expand the power to condemn for remnant purposes was recently exemplified by the California Supreme Court in *People ex rel. Department of Public Works v. Superior Court*.<sup>69</sup> In this case, the condemnee owned a 54.11-acre triangular parcel, the southwesterly tip of which abutted the northeasterly corner of a large rectangular shaped parcel also owned by the condemnee. The state constructed a freeway that cut through the

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<sup>60</sup> CAL. STREETS & H'WAYS CODE § 104.1.

<sup>61</sup> CAL. WATER CODE §§ 254, 11,575.2.

<sup>62</sup> CAL. WATER CODE § 8590.1.

<sup>63</sup> *Id.* § 43,533.

<sup>64</sup> CAL. STREETS & H'WAYS CODE § 943.1 (county).

<sup>65</sup> The quoted language appears in several code sections. CAL. STREETS & H'WAYS CODE §§ 104.1, 943.1; CAL. WATER CODE §§ 254, 8590.1; see *id.* §§ 11,575.2, 43,533.

<sup>66</sup> CAL. CODE CIV. PROC. § 1266.

<sup>67</sup> 180 Cal. 7, 179 P. 180 (1919).

<sup>68</sup> See *People v. Thomas*, 108 Cal. App. 2d 832, 239 P.2d 914 (1952).

<sup>69</sup> 68 A.C. 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968).

adjoining tips of the two parcels of property, taking 0.57 of an acre from the rectangular portion and 0.08 of an acre from the triangular portion. Because the freeway landlocked the 54.03 acre remainder of the triangular parcel, the state sought to acquire it as excess under Streets and Highways Code section 104.1.<sup>70</sup> The trial court held as a matter of law that such a taking was not for a public use. The supreme court disagreed and granted the state's petition for a writ of mandate.

The court, basing its decision on the *McDonald* rationale, observed that if physical remnants could not be acquired, the property owner would receive compensation equal or almost equal to the value of his entire parcel but would still retain a portion of his land. This would result in an unwarranted and inequitable windfall to the condemnee.<sup>71</sup> It would also deprive the condemnor of the opportunity to minimize the cost of the improvement by acquiring the remnant at little or no cost above the amount of just compensation otherwise payable to the condemnee and then reselling the remnant at a profit. The court noted that these undesirable results would follow irrespective of the size of the remnant parcel, and thus upheld the use of the remnant statutes to acquire large physical remnants as well as economic ones.

While the decision significantly expands the remnant theory, the holding is equally significant for the limitations it places on the remnant statutes. As drafted, the statutes do not merely authorize acquisitions of financial or physical remnants, but also authorize the taking of any remainder of such shape or size as "to give rise to claims or litigation concerning severance or other damage . . ."<sup>72</sup> The defendant properly argued that the statutes as drafted authorized the taking of any remainder in *every* partial condemnation case. The defendant,

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<sup>70</sup> See text accompanying note 65 *supra*, wherein the portion of the statute authorizing such acquisition is quoted.

<sup>71</sup> Cases involving landlocked remainders present a definite possibility of landowner windfalls absent remnant statutes and decisions similar to that of *People v. Superior Court*. In such cases, the property owner could intentionally fail to seek easements of access from possibly sympathetic adjacent property owners until after the award of substantial severance damages. If the property owner thereafter acquired an access easement by negotiation or private condemnation, see note 80 *infra*, at a cost that is less than the damages he received on account of the landlocking, the difference would clearly be a windfall. Such a course of conduct would violate the condemnee's duty to mitigate damages. *Albers v. Los Angeles County*, 62 Cal. 2d 250, 269, 398 P.2d 129, 141, 42 Cal. Rptr. 89, 101 (1965). But proving such a failure is difficult. The decision in *People v. Superior Court* meets this problem by forcing the condemnee to seek such easements or otherwise mitigate severance damages if he wishes to retain his severely damaged remainder.

<sup>72</sup> The quoted language appears in several code sections. CAL. STREETS & H'WAYS CODE §§ 104.1, 943.1; CAL. WATER CODE §§ 254, 8590.1.

therefore, attacked the statutes as void because they allowed the condemnor to take a property owner's entire parcel unless the owner agreed to accept the condemnor's valuation of severance damages as well as its valuation of the portion to be used for the project.<sup>73</sup> To deny the state the power to so nullify the condemnee's constitutional right to just compensation, the court held that the statutes applied only to those cases where the taking is justified to prevent the payment of *excessive* severance or consequential damages.<sup>74</sup> As a result, the court de facto voided a legislative declaration of public use.

The court also defined the scope of judicial review by drawing a distinction between issues of public use and necessity in remnant acquisitions. The state argued that judicial review was limited to an inquiry as to whether severance damages existed. If such damages were present, the state contended, the question of whether they were excessive related to the issue of necessity, which was conclusively

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<sup>73</sup> Such coercion had occurred in the past. See letter from Ruel A. Speck to J. A. Erickson, Feb. 20, 1964 (Speck was Senior Right of Way Agent, Division of Highways, Department of Public Works in California):

We have been informed by Mr. Hodges today that you have a purchaser for the northerly 17 ( $\pm$ ) Acres of your property which will not be required in the construction of the proposed Route 161 Freeway, and that the prospective purchaser is asking for some assurance the State will not require this property.

This letter, therefore, is to advise you that if Roger Dunn, et ux, accept the State's offer to purchase approximately 8.85 Acres actually required for the construction of Route 161 Freeway, the State has no further interest in and will not require the 17 ( $\pm$ ) Acres of Hillside land lying northerly of the proposed right of way line. Any condemnation action covering this portion of the property will be dismissed at such time as the State's escrow covering the partial acquisition of said 8.85 Acres has closed and a policy of title insurance has been received.

If Mr. Dunn is interested in proceeding on this basis, it will be appreciated if you will advise us as soon as possible in order that we may proceed with the necessary decertification of the 17( $\pm$ ) Acres, as well as the small area lying northerly of the end of Townsend Avenue.

Similar contentions have been made by defendants in other cases. *E.g.*, *People ex rel. Department of Pub. Works v. Lagiss*, 160 Cal. App. 2d 28, 324 P.2d 926 (1958).

<sup>74</sup> *People ex rel. Department of Pub. Works v. Superior Court*, 68 A.C. 206, 214, 436 P.2d 342, 347, 65 Cal. Rptr. 342, 347 (1968). As a result of this holding, the condemnor is faced with a serious decision whenever a remnant acquisition is proposed. To take the remnant, the condemnor must contend that the remainder has been almost totally damaged by the taking. Should this contention fail, the condemnor could hardly take the position at trial that the remainder was not seriously damaged. Such a prospect should limit an indiscriminate or coercive use of the power to condemn remnants.

Conversely, the decision also affects every property owner who wishes to retain his seriously damaged remainder. Such an owner will not be able to take an extreme position on severance damages without incurring the risk that the remainder will be acquired as an economic remnant.



established by the condemnor's resolution. However, it is apparent that if remnant acquisitions constitute a taking for a public use *only* if they avoid excessive severance damages, the entity which decides whether damages are excessive also thereby decides public use. The court, therefore, properly held that in financial remnant takings the trial court was to determine the excessive severance damages issue.<sup>75</sup>

While the court did not expressly define the meaning of excessive severance damages, it appears from the language of the decision that damages may be excessive even if they do not equal the "before value" of the remainder.<sup>76</sup> It is also fairly clear, however, that the court contemplated that damages would not be excessive unless they constituted a very substantial portion of the remainder's value before the taking. For example, that portion of the statute approved by the court requires the remainder to be of little value to the owner before the excess taking is authorized.

This decision may require some modification of valuation rules commonly used to determine severance damages. Usually, severance damages are determined by subtracting the value of the remainder in its after condition from its value as part of the entire parcel before condemnation.<sup>77</sup> Also, the usual valuation rules require that any unique value of the property to its owner be disregarded on the theory that the condemnor is constitutionally required to pay only for the objectively measured fair market value of what it receives.<sup>78</sup> This rationale, however, has no application when the purpose of the valuation is to determine whether the condemnor can acquire the remainder

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<sup>75</sup> *Id.* at 216, 436 P.2d at 348, 65 Cal. Rptr. at 348.

<sup>76</sup> *Id.* at 214, 436 P.2d at 347, 65 Cal. Rptr. at 347. *But see* *La Mesa v. Tweed & Gambrell Planing Mill*, 146 Cal. App. 2d 762, 304 P.2d 803 (1956), where it is held that remnants may not be taken under section 1266 of the Code of Civil Procedure unless the severance damages equal the value of the remainder before the taking.

<sup>77</sup> *E.g.*, *People v. Ricciardi*, 23 Cal. 2d 390, 144 P.2d 799 (1943); *San Bernardino County Flood Control Dist. v. Sweet*, 255 A.C.A. 1047, 63 Cal. Rptr. 640 (1967); *People ex rel. Department of Pub. Works v. Lundy*, 238 Cal. App. 2d 354, 47 Cal. Rptr. 694 (1965); *People ex rel. Department of Pub. Works v. Lipari*, 213 Cal. App. 2d 485, 28 Cal. Rptr. 808 (1963).

<sup>78</sup> *E.g.*, *Pacific Gas & Elec. Co. v. Hufford*, 49 Cal. 2d 545, 319 P.2d 1033 (1957); *People v. La Macchia*, 41 Cal. 2d 738, 264 P.2d 15 (1953); *Los Angeles v. Cole*, 28 Cal. 2d 509, 170 P.2d 928 (1946); *Santa Ana v. Harlin*, 99 Cal. 538, 34 P. 224 (1893); *San Diego Land & Trust Co. v. Neale*, 88 Cal. 50, 25 P. 977 (1891); *Muller v. Southern Pac. Branch Ry.*, 83 Cal. 240, 23 P. 265 (1890); *People ex rel. Department of Pub. Works v. Lundy*, 238 Cal. App. 2d 354, 47 Cal. Rptr. 694 (1965); *People ex rel. Department of Pub. Works v. Los Angeles*, 220 Cal. App. 2d 345, 33 Cal. Rptr. 797 (1963); *Los Angeles County v. Bean*, 176 Cal. App. 2d 521, 1 Cal. Rptr. 464 (1959); *Pasadena v. Union Trust Co.*, 138 Cal. App. 21, 31 P.2d 463 (1934).

because it is of little value to the property owner. If the remainder in its "after" condition has a value unique to the owner which is greater than its objective fair market value, and this unique value is voluntarily recognized by the owner, the *Superior Court* decision may require that this unique value be recognized in the computation of severance damages in remnant acquisitions. Recognizing unique values would prevent the condemnor from making a coercive use of the power to condemn remnants.

Once severance damages have been so computed, the "cost to cure" should also be determined, *i.e.*, the cost of any improvements or acquisitions made by the condemnor to reduce damages to the remaining property. If the cost to cure is less than the diminution in market value of the remainder due to the severance, then the cost to cure, rather than the market value diminution, is the measure for severance damages.<sup>79</sup> It is unclear, however, under the *Superior Court* decision whether the cost to cure should include, in landlocked excess takings, the cost to the condemnor of acquiring easements for access if the property owner is willing to accept them. Where the condemnor has the power to acquire property for exchange purposes, and where the cost of easements for access is less than the amount of severance damages to the remainder, the cost of such easements should be considered in determining the excessive severance damages issue. Otherwise, the state, by refusing to acquire such an easement, could cause severance damages to be so substantial as to justify in all cases its acquisition of excess property.<sup>80</sup> Similarly, where the property owner is empowered to acquire easements for access by private condemnation proceedings, judicial recognition of the cost of such acquisitions would prevent the condemnor from overstating severance damages.<sup>81</sup>

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<sup>79</sup> *People ex rel. Department of Pub. Works v. Flintkote Co.*, 264 A.C.A. 115, 70 Cal. Rptr. 27 (1968). If, however, the cost to cure is *greater* in amount than the decrease in the market value of the remaining property if left untouched, then the diminution in market value is used to measure severance damages. *Id.*

<sup>80</sup> Requiring a condemnor to acquire easements of access may constitute a violation of the doctrine of separation of powers. See Note, *Substitute Condemnation*, 54 CALIF. L. REV. 1097 (1966). However, by considering the cost of acquiring easements of access, the court would not be requiring that the condemnor undertake such condemnations. The court would merely deny the condemnor the power to acquire the remnant if the cost of condemning an easement for access purposes was substantially less than severance damages otherwise payable.

<sup>81</sup> Private persons may condemn private property for public uses in certain cases. CAL. CIV. CODE § 1001. Acquisition for paths and roads constitute takings for public uses. CAL. CODE CIV. PROC. § 1238(4); see *Sherman v. Buick*, 32 Cal. 241 (1867). However, the private condemnor is held to a strict

Generally speaking, *People v. Superior Court* makes clear the extent of the power to condemn remnants in California. Remnant acquisitions are constitutionally permissible regardless of whether the remainder is a physical or a financial remnant. Whether a remainder is an economic remnant is a justiciable question of fact. A remainder qualifies as such a financial remnant if severance or other damage equals a very substantial part of the remainder's value before condemnation. Remainders, however, cannot be acquired merely because the property owner claims severance damage or the condemnor desires to avoid the cost of litigating damages.

The United States Supreme Court has indicated a position in conformity with that of *People v. Superior Court* with its decision in *United States ex rel. TVA v. Welch*.<sup>82</sup> In *Welch*, the Tennessee Valley Authority, in constructing the Fontana Dam and reservoir, had inundated a county highway which serviced a sparsely settled 44,000 acre area outside the reservoir. The cost of relocating the highway was estimated at \$1,400,000, but the market value of the land which it serviced was only a fraction of that amount. The Supreme Court authorized the acquisition of this excess land, and held:

The cost of public projects is a relevant element . . . and the Government, just as everyone else, is not required to proceed oblivious to elements of cost. . . . And when serious problems are created by its public projects, the Government is not barred from making a common sense adjustment in the interest of all the public.<sup>83</sup>

## 2. *Protective Acquisitions*

California adopted the protective theory of excess condemnation when section 14½ was added to article I of the state constitution. This provision authorizes excess acquisitions of property lying within 200 feet of the closest boundary of memorial grounds, streets, squares or parkways. The section further authorizes the condemnor to con-

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standard of necessity. *E.g.*, *Linggi v. Garovotti*, 45 Cal. 2d 20, 286 P.2d 15 (1955); see Note, *Eminent Domain: Right of Exercise by a Private Person*, 44 CALIF. L. REV. 785 (1956). And in some cases, only certain governmental agencies may acquire property for particular purposes. *E.g.*, *Sierra Madre v. Superior Court*, 191 Cal. App. 2d 587, 12 Cal. Rptr. 836 (1961). See also *People ex rel. Department of Pub. Works v. Chevalier*, 52 Cal. 2d 299, 340 P.2d 598 (1959). Yet where these and similar limitations are shown not to prohibit the property owner from acquiring easements of access in a future private condemnation action, the cost of acquiring such easements could well be considered in determining whether the remainder is truly of little or no value where the governmental agency proposes to acquire it as excess under the financial remnant theory.

<sup>82</sup> 327 U.S. 546 (1946).

<sup>83</sup> *Id.* at 554. See also *United States v. Willis*, 211 F.2d 1 (8th Cir. 1954), cert. denied, 347 U.S. 1015 (1954); *United States v. 121 Acres of Land*, 263 F. Supp. 737 (N.D. Cal. 1967).

vey such parcels to private persons after restrictions are imposed to protect the project and preserve "the view, appearance, light, air and usefulness of such public works."<sup>84</sup>

Section 14½ was adopted in the belief that absent such express authority excess condemnations for protective purposes would not constitute a "public use" within the meaning of article I section 14 of the constitution.<sup>85</sup> Decisions in other states at that time had declared protective takings unconstitutional either because the state followed the physical "public usage" test of determining public use, or because the courts were of the opinion that the resale to private persons constituted a private use.<sup>86</sup> Since 1928, however, the federal and state courts have rejected the physical "public usage" test<sup>87</sup> and have upheld acquisitions of land which the condemnor planned to retain merely to protect public improvements not located on the parcels acquired.<sup>88</sup> Further, federal and state decisions have sustained takings of private property where the condemnor proposed to resell the property after imposing restrictions on it to prohibit detrimental uses on the parcels acquired.<sup>89</sup> Thus, the constitutional arguments for invalidating protective takings have generally been rejected.<sup>90</sup>

But while the validity of protective acquisitions is thus assured under the stringent provisions of section 14½, it is fairly clear that the general "public use" limitation of section 14 would now support such excess takings. The ironic result is that the distance limitations

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<sup>84</sup> CAL. CONST. art. I, § 14½.

<sup>85</sup> *Argument for Proposed Senate Constitutional Amendment No. 16, 1928 BALLOT PAMPHLET*, cited in *People ex rel. Department of Pub. Works v. Superior Court*, 68 A.C. 206, 212, 436 P.2d 342, 346, 65 Cal. Rptr. 342, 346 (1968); see Note, *The Constitutionality of Excess Condemnation*, 46 COLUM. L. REV. 106, 111-12 (1946); Note, *The Problem of Excess Condemnation*, 27 WASH. U.L.Q. 466, 472-73 (1942).

<sup>86</sup> *E.g.*, Opinion of the Justices to the Senate, 204 Mass. 616, 91 N.E. 578 (1910); *Pennsylvania Mut. Life Ins. Co. v. Philadelphia*, 242 Pa. 47, 88 A. 904 (1913); see Comment, *Eminent Domain—The Meaning of the Term "Public Use"—Its Effect on Excess Condemnation*, 18 MERCER L. REV. 274 (1966); Note, *An Expanded Use of Excess Condemnation*, 21 U. PITT. L. REV. 60, 63 (1959).

<sup>87</sup> *Bauer v. Ventura County*, 45 Cal. 2d 276, 284, 289 P.2d 1, 6 (1955); *Redevelopment Agency v. Hayes*, 122 Cal. App. 2d 777, 789-90, 266 P.2d 105, 114, cert. denied, 348 U.S. 897 (1954).

<sup>88</sup> *E.g.*, *United States v. Bowman*, 367 F.2d 768, 770 (7th Cir. 1966); *United States v. 91.69 Acres of Land*, 334 F.2d 229 (4th Cir. 1964); *United States v. Agee*, 322 F.2d 139 (6th Cir. 1963); *Monterey County Flood Control & Water Conser. Dist. v. Hughes*, 201 Cal. App. 2d 197, 20 Cal. Rptr. 252 (1962).

<sup>89</sup> *United States v. Bowman*, 367 F.2d 768, 770 (7th Cir. 1966).

<sup>90</sup> *People ex rel. Department of Pub. Works v. Lagiss*, 223 Cal. App. 2d 23, 35 Cal. Rptr. 554 (1963) (commenting favorably on section 104.3 of the Streets and Highways Code).

contained in section 14½ may be more restrictive than would have obtained had the section not been adopted. California courts, therefore, have limited section 14½ to protective acquisitions, refusing to extend the distance limitations to remnant, exchange, or other acquisitions.<sup>91</sup>

It is also difficult to support an argument that section 14½ voids statutes that authorize protective acquisitions other than those described in section 14½. The section could have this result only if it were the sole authority for excess condemnations for protective purposes. Section 14½ however, must be regarded as only a constitutional declaration of *specific* public uses within the general "public use" limitation of article I, section 14. Otherwise, section 14½ would purport to authorize condemnations for *non*-public purposes and would thus violate the fourteenth amendment of the federal Constitution.

Furthermore, it is difficult to interpret section 14½ as an exclusive particularization of uses for which protective acquisitions can be made, for the section was adopted not to limit but to expand the public use concept.<sup>92</sup> As a result, several decisions have indicated that the distance limitations of section 14½ apply only to the uses specified in that section.<sup>93</sup> Moreover, the legislature has since enacted several protective acquisition statutes which exceed the distance limitations contained in section 14½. For example, Water Code section 256 authorizes protective acquisitions of property within 600 feet of improvements constructed by the Department of Water Resources. Streets and Highways Code section 104.3 contains distance limitations substantially the same as those of section 14½, but authorizes protective acquisitions for improvements other than those described in section 14½.<sup>94</sup> While Streets and Highways Code section 104.3 has received favorable judicial comment,<sup>95</sup> no reported decision has de-

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<sup>91</sup> *People ex rel. Department of Pub. Works v. Superior Court*, 68 A.C. 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968); *People ex rel. Department of Pub. Works v. Garden Grove Farms*, 231 Cal. App. 2d 666, 42 Cal. Rptr. 118 (1965); *Redevelopment Agency v. Hayes*, 122 Cal. App. 2d 777, 266 P.2d 105 (1954).

<sup>92</sup> See note 85 *supra*.

<sup>93</sup> *People ex rel. Department of Pub. Works v. Garden Grove Farms*, 231 Cal. App. 2d 666, 671-72, 42 Cal. Rptr. 118, 121-22 (1965); *Redevelopment Agency v. Hayes*, 122 Cal. App. 2d 777, 810, 266 P.2d 105, 126 (1954); see *People ex rel. Department of Pub. Works v. Superior Court*, 68 A.C. 206, 212, 436 P.2d 342, 346, 65 Cal. Rptr. 342, 346 (1968) (holding that section 14½ does not limit condemnation for other than protective purposes).

<sup>94</sup> Protective acquisitions for "any state highway or other public work or improvement constructed or to be constructed by the department . . ." are authorized by CAL. STREETS & H'WAYS CODE § 104.3.

<sup>95</sup> *People ex rel. Department of Pub. Works v. Lagiss*, 223 Cal. App. 2d 23, 35 Cal. Rptr. 554 (1963).

terminated whether this statute is unconstitutional to the extent it exceeds the limitations of section 14½. It appears, however, that statutes authorizing protective condemnations in connection with public projects other than those described in section 14½ are valid even if they contain more liberal distance limitations than found in section 14½ provided the true purpose of the condemnation is protective. If the purpose of a particular acquisition is not protective, the validity of the acquisition depends on whether the true purpose is a constitutional one.

In reviewing public use, the court can determine whether the purpose sought to be served by the acquisition is a public one. If the condemnor proposes to impose no restrictions, the purpose could hardly be protective. If it is shown that the acquisition is for recoupment purposes, the court can determine the validity of that acquisition on the basis of whether recoupment constitutes a public use.

### 3. *Recoupment Acquisitions*

Certain elements of the recoupment theory are incorporated by implication into the California constitutional and statutory authorizations for remnant and protective acquisitions, but only Government Code sections 192 and 193 could possibly be used to justify eminent domain takings *solely* for recoupment purposes. Section 192 purports to authorize state, county, or city agencies, whenever they are acquiring land for public "places," to acquire "land in excess of the land actually needed or used for public purposes." Section 193 authorizes the sale of such lands.

There is some legislative evidence that these sections were only intended to complement the protective acquisition provisions of section 14½. The preamble of the 1929 enacting statute indicates that the sections were enacted merely to provide a procedure for acquiring and disposing of those properties which could be taken under the authority of section 14½.<sup>96</sup> Also, if the language of the sections

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<sup>96</sup> Cal. Stats. 1929, ch. 795, preamble, at 1611, provided:

*An act to prescribe a procedure for the acquisition by the state, counties, cities and cities and counties of property under the provisions of section 14½ of article one of the constitution of California; also providing for the sale or other disposition and conveyance of lands so acquired, and providing for the disposition of the proceeds of the sale of such lands.*

Sections 191 and 192 of the Government Code may violate article IV, section 9 of the state constitution which requires the title of a statute to express the subject of the statute and declares that any subject not so expressed is void. See *People v. Superior Court*, 10 Cal. 2d 288, 293, 73 P.2d 1221, 1224 (1937). However, the courts have evidenced a marked reluctance to void statutes under Article IV section 9. *E.g.*, *Metropolitan Water Dist. v. Marquardt*, 59 Cal. 2d 159, 379 P.2d 28, 28 Cal. Rptr. 724 (1963); *Orange County Water Dist. v.*

were fully effective, there would have been no need to enact Water Code section 256. However, these reasons alone are inadequate to overcome the clear language of the sections authorizing excess condemnations apart from the provisions of section 14½. Further, these code sections contain no distance limitations, do not require the imposition of protective restrictions prior to resale, and do not in any other way limit the use of the sections to protective acquisitions. While the constitutionality of these sections has been assumed in one non-condemnation decision,<sup>97</sup> the constitutional defects have never been discussed or decided in any reported decision.

The sections are clearly unconstitutional to the extent they purport to authorize takings for other than public uses. They are likewise void to the extent they purport to authorize the taking of land beyond the distance limitations of section 14½ to protect improvements described in that section. They may also be entirely unconstitutional as an unduly vague delegation of authority. It should be remembered, however, that in *People v. Superior Court*<sup>98</sup> the California Supreme Court upheld, in part, a very general statutory delegation by interpreting narrowly the statute's language. The supreme court, therefore, if presented with the validity of Government Code sections 192 and 193, may likewise limit these sections by a restrictive interpretation of their terms. If these sections are so interpreted they will provide the requisite legislative authority for the fullest exercise of the power to condemn for protective purposes, but furnish no authority for recoupment takings. This would be a proper result, since condemnation solely for recoupment purposes is a dangerous and unacceptable practice. An unlimited power to acquire private property any time costs will be reduced by such an acquisition may inflict grievous financial hardships upon individual citizens. More importantly, the arbitrary exercise of such a power would seriously jeopardize an economic structure, such as ours, that is based upon private ownership.

While no California court has ruled directly on the constitutionality of recoupment takings, several decisions contain dicta either disapproving of such takings<sup>99</sup> or carefully distinguishing the theory

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Farnsworth, 138 Cal. App. 2d 518, 292 P.2d 927 (1956). Further, Cal. Stats. 1929, ch. 795, was repealed in 1953 when it was codified without substantial change as CAL. Gov't CODE §§ 190-96. Cal. Stats. 1953, ch. 170, §§ 2, 23, at 1084-85, 1101.

<sup>97</sup> See also *Baker v. Palo Alto*, 190 Cal. App. 2d 744, 754, 12 Cal. Rptr. 425, 430-31 (1961), where a city's purchase of property was upheld by use of section 192 of the Government Code.

<sup>98</sup> 68 A.C. 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968).

<sup>99</sup> E.g., *Sacramento Mun. Util. Dist. v. Pacific Gas & Elec. Co.*, 72 Cal. App. 2d 638, 654, 165 P.2d 741, 750 (1946); cf. *Baker v. Palo Alto*, 190 Cal.

of the case from recoupment.<sup>100</sup> The federal courts not only have likewise strained to distinguish recoupment takings from the facts of the decided case but have, on occasion, expressed disapproval of the theory directly.<sup>101</sup> Other courts and authors have also condemned acquisitions solely for recoupment purposes.<sup>102</sup>

In *Cincinnati v. Vester*,<sup>103</sup> for example, the city attempted to acquire parcels located entirely outside the area needed for purposes of widening a street. The owners of these parcels commenced an action in the federal district court for an injunction, arguing the city's purpose was recoupment. The injunction was granted and the court of appeals affirmed, holding that excess property could be acquired only to further the normal use for which the property occupied by the improvement was to be used. The court thus held that acquisitions solely for recoupment purposes were, *per se*, not for public use and, therefore, violated the due process clause of the fourteenth amendment. Considering the limited nature of the power of eminent domain, as well as the rules of compensation which apply to it, the *Vester* decision is sound.

However, in view of present growing governmental financial needs, recoupment takings are undoubtedly attractive. Public agencies spend large sums annually to construct public improvements. Many of these improvements cause great increases in adjacent land values. This occurs, for example, when the construction of a dam turns barren hillside lots into view homesites, or the construction of a freeway off-ramp makes a service station site out of a pasture. The result in such cases is that the property owner receives handsome, cost-free benefits. Recoupment acquisitions enable condemnors to obtain these benefits for the public by acquiring all parcels so benefited at pre-enhancement prices, whether or not any portion of such parcels will be used for the proposed project. The condemnor may then resell them at the highest price they will bring, thus enriching the

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App. 2d 744, 754, 12 Cal. Rptr. 425, 430-31 (1961) (court held the acquisition was not speculation). See generally 37 OPS. CAL. ATT'Y GEN. 161 (1961).

<sup>100</sup> *People ex rel. Department of Pub. Works v. Superior Court*, 68 A.C. 206, 214 n.7, 436 P.2d 342, 347 n.7, 65 Cal. Rptr. 342, 347 n.7 (1968).

<sup>101</sup> *Brown v. United States*, 263 U.S. 78, 82 (1923); *Southern Pac. Land Co. v. United States*, 367 F.2d 161, 163 (9th Cir. 1966); *Cincinnati v. Vester*, 33 F.2d 242 (6th Cir. 1929).

<sup>102</sup> *E.g.*, *Opinion of the Justices to the Senate*, 204 Mass. 616, 91 N.E. 578 (1910); cf. *Port v. Richmond*, 212 Ore. 596, 321 P.2d 338 (1958). But cf. *Atwood v. Willacy County Navigation Dist.*, 271 S.W.2d 137 (Tex. Civ. App. 1954). See generally R. CUSHMAN, *EXCESS CONDEMNATION* 212-14 (1917); 2 P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 7.223 (rev. 3d ed. 1963); 24 ILL. L. REV. 918 (1930).

<sup>103</sup> 33 F.2d 242 (6th Cir. 1929), *aff'd on other grounds*, 281 U.S. 439 (1929); see note 40 *supra*.



public treasury.

There are, however, serious problems inherent in such acquisitions. The attractiveness of these takings is based in part on the assumption that it is unjust for a property owner to enjoy personally benefits paid for by the public. However, it should be noted that the converse situation has been judicially approved. It is well established, for example, that where an improvement *reduces* the value of adjacent land, the condemnor is under no duty to reimburse the property owner.<sup>104</sup> Even if a meaningful distinction can be made between these cases of "blight" and those where the project "enhances" the value of adjacent land, one is still not impelled to the conclusion that recoupment takings are proper, for the property owner, under proper legislation, could be permitted to keep his land and yet pay for the benefits by special assessments.

Moreover, an analysis of the power of eminent domain reveals other more basic problems with recoupment takings. The power of eminent domain is classified as an inherent attribute of sovereignty because, without the power, uncontrolled private decisions not to sell could deprive government of land that is essential to governmental operations.<sup>105</sup> The concept of just compensation is influenced by the overriding governmental interest. The policy followed in determining the extent of just compensation is a dichotomous one that seeks to spread individual losses among the public while avoiding such liberality as to force the costs of projects to prohibitive heights.<sup>106</sup> Unfortunately, the condemnor's interests have received far too much emphasis. As a result, many items of sometimes substantial loss are not compensated.<sup>107</sup> This misplaced emphasis makes eminent domain a

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<sup>104</sup> *E.g.*, *United States v. Miller*, 317 U.S. 369, 376 (1943); *People ex rel. Department of Pub. Works v. Symons*, 54 Cal. 2d 855, 860, 357 P.2d 451, 454, 9 Cal. Rptr. 363, 366 (1960); *People v. Thompson*, 43 Cal. 2d 13, 26, 271 P.2d 507, 514 (1954); *Los Angeles v. Geiger*, 94 Cal. App. 2d 180, 191, 210 P.2d 717, 724 (1949).

<sup>105</sup> See Comment, *Some Recent Developments in Community Redevelopment Laws*, 6 HASTINGS L.J. 80 (1954).

<sup>106</sup> *Bacich v. Board of Control*, 23 Cal. 2d 343, 358, 144 P.2d 818, 827 (1943) (Edmonds, J.) (concurring opinion).

<sup>107</sup> There are several types of non-compensable losses in condemnation cases. First, there is the cost of removing personalty. *Joslin Mfg. Co. v. Providence*, 262 U.S. 668, 676 (1923); *Central Pac. R.R. v. Pearson*, 35 Cal. 247 (1868); *Los Gatos v. Sunol*, 234 Cal. App. 2d 24, 44 Cal. Rptr. 181 (1965); *La Mesa v. Tweed & Gambrell Planing Mill*, 146 Cal. App. 2d 762, 304 P.2d 803 (1956). Second, the cost of an option to purchase a new site, appraisal fees, architect's fees, interest and loan fees on loans for construction at a new site, increased insurance costs, advertising costs for the new location, and accountant's and attorney's fees are all non-compensable. See *Los Gatos v. Sunol*, *supra*. Third, the loss of good will and profits, damage to business reputation and good will, and losses arising from disrupting customer habits

poor taking power, for it leaves the property owner with a net economic loss for the sole purpose of providing the public with nothing more than the opportunity of economic gain. Where economic gain and not land itself is the object of the acquisition, there is little justification for leaving the property owner less than whole.

The financial burdens that recoupment acquisitions place on property owners could be alleviated by legislative or judicial development of just compensation rules different from those followed in non excess condemnation actions. The much more fundamental issue, however, is whether the interest of the public in recapturing enhancement values caused by public improvements outweighs our society's interest in private ownership of real property. The federal and state constitutions obviously protect private ownership from non-public use takings, but the criteria for determining what is and what is not a public use have not been clearly established. Since the courts have defined public use as *any* use reasonably related to proper governmental objectives, it is incumbent on them to some extent to determine proper governmental objectives. Actually, despite all the presumptions in favor of legislative declarations of public use, and inherent judicial reluctance to determine such objectives, the courts, on occasion, have done so.<sup>108</sup> This is only proper. It is not a correct governmental function to acquire property merely to avoid the cost of litigating claims of severance or other damage. Neither the courts nor the legislature should grant favorable recognition of such actions.

### Conclusion

With the expansion of the theory of eminent domain from the narrow "public usage" test to a more workable emphasis on the public benefit, the issues and problems related to excess condemnation become manifest. In California, acceptance of the remnant and the protective theories has allowed, within judicially established boundaries, a proper harmonization of maximum public benefit at minimum

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are non-compensable. *Los Angeles v. Allen's Grocery Co.*, 265 A.C.A. 299, 71 Cal. Rptr. 88 (1968). Fourth, the loss in value of personalty caused by severance and removal from condemned property is non-compensable. *Los Angeles v. Siegel*, 230 Cal. App. 2d 982, 41 Cal. Rptr. 563 (1964). Fifth, the loss suffered when a taking precludes an owner's planned improvement is non-compensable. Comment, *Valuation Evidence in California Condemnation Cases*, 12 STAN. L. REV. 766, 777 (1960). Sixth, the loss of beneficial financing and the loss of a nonconforming user's rights are non-compensable. Crouch, *Valuation Problem Under Eminent Domain*, 1959 WIS. L. REV. 608, 623-25. For a further discussion of non-compensable items of damage, see 1 L. ORGEL, *VALUATION UNDER THE LAW OF EMINENT DOMAIN* (2d ed. 1953).

<sup>108</sup> *Hogue v. Port of Seattle*, 54 Wash. 2d 799, 817-18, 838, 341 P.2d 171, 181, 193 (1959).

private cost. While clearly attractive from the viewpoint of the condemnor, however, recoupment acquisitions raise serious questions which may well prompt the courts to reject the recoupment theory as unconstitutional.